United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1390

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- X

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-v-

JOSE LABOY,

Docket No. 75-1390

Defendant-Appellant.

- X

Appeal from the United States District Court
for the Eastern District of New York

BRIEF FOR APPELLANT

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BRIEF FOR APPELLANT

STATEMENT OF ISSUES PRESENTED FOR REVIEW

a. Was defendant denied his right to a fair trial by the conduct of the trial court.

b. Was the charge on the crime of conspiracy inadequate for failure to include scienter.

c. Was there sufficient non-hearsay evidence to connect defendant to a conspiracy.

d. Was the variance between indictment and proof fatal to conviction herein.

e. Did the action of the prosecutor depriving defendant of a witness violate his Constitutional right to call witnesses.

STATEMENT OF THE CASE

Jose LaBoy was indicted (75CR116) on a two count indictment charging conspiracy to violate 21 U.S.C. §841 (21 U.S.C §846) and violation of 21 U.S.C. §841 arising out of negotiations with reference to and possession with intent to sell cocaine on December 3, 1974. Jury trial was commenced before the Honorable John R. Bartels, U.S.D.J. on September 18, 1975, a hearing on a suppression motion having been held on May 19, 1975. Luis LaBoy, a co-defendant and alleged co-conspirator pled guilty to the Indictment prior to trial. Defendant-appellant, (hereinafter referred to as defendant) was convicted of conspiracy and sentenced thereon to a term of imprisonment of three years plus a special parole term of five years. The jury was unable to agree as to the substantive count.

STATEMENT OF THE FACTS

Sometime prior to November 21, 1974, Alberto Pineda, a paid informant, made contact with Alberto Quinone* and through him, met Luis LaBoy, William Cruz and David (later identified by Alberto Pineda as Jose LaBoy) at 88 Stone Avenue, Brooklyn, New York. At that time, a possible sale of cocaine to the informant was discussed. (A15-A27) At no time during testimony as to these meetings was the witness definitely able to say who actually said what during this or any subsequent conversation. On November 21, 1974, Pineda returned to the apartment, driven there by D.E.A. Melvin, and accompanied by Alberto Quinone. (A33-A35). Pineda and Quinone actually entered the apartment; Luis, David and Willie were present. There was another conversation with reference to a cocaine transaction, but because of a difference of opinion as to quantity and whether Agent Melvin could come into the apartment, no transaction took place. (A41-A45). Quinone accompanied Pineda back to the car in which Agent Melvin was sitting, to relate what had occurred (A43-44). On November 27, 1974 Pineda and Melvin picked up Quinone and proceeded to 88 Stone Avenue; Agent Melvin "showing" money to Quinone (A51).

*Indicted as Alberto Guinone; references herein will be to Alberto Quinone, so as to clarify references in transcript.

Quinone and Pineda left the car to enter the apartment; on their way they met Willie Cruz and another individual leaving 88 Stone Street, who told them that the cocaine had already been sold (A52-A53).

Pineda further testified that on December 3, 1974 he went back to Luis LaBoy's apartment by himself. (A54). Luis asked him to drive to 24 Furman Street, which he did (A54). On arrival, Luis went in to the building; Pineda stayed in the car. While he was waiting, he saw Jose LaBoy enter the building with one Israel Rodriquez. (A55). Jose LaBoy and his companion exited the building and drove away (A56). Luis returned, telling Pineda to return to his (Luis') apartment. (A56) Pineda telephoned Agent Melvin to inform him of what had transpired, and then began to return (A56-A57). On the way, Pineda ran out of gas. William Cruz appeared and assisted him (A57-A59), telling him to go to 88 Stone Avenue (A59). When Pineda got to the apartment, Luis, Willie, Jose and Israel were all there (A60). In answer to the question of whether the cocaine was ready to sell, Pineda was told to return that evening (A60). Jose LaBoy took a box out of a closet, removing a bag therefrom and handed it to Luis, who handed it to Willie (A61-A62). Willie removed another bag from the original bag and weighed the contents (A63). Willie,

Luis, Israel and Jose all sniffed the white powder (A64). The bag was replaced in the box and the box was put "back where it belong." (A65) Pineda was told to come back at 3:30, at which time Luis, Israel and Jose would be present (A65). Pineda returned at 3:30; Luis alone was present (A66). Pursuant to instructions given to him by Agent Melvin, Pineda told Luis that he couldn't complete the deal until 5:00 p.m. that afternoon. (A65-A66). Drug Enforcement Agency Agents Carr, Blackburn, Jones, Hammonds, and Feeney met with Pineda and Agent Melvin at about 4:30 that afternoon and arranged for a signal to be used by Pineda if the person with him was carrying cocaine (Tr. 300, A67).

They all proceeded into the area of 88 Stone Avenue and all agents other than Agent Melvin took up surveillance positions. (Tr. 300, 317, 322). Pineda left the automobile which was parked around the corner and half way down the block from 88 Stone Avenue (A68). At this time, Luis, Israel and Jose were present in the apartment (A69). Luis placed the cocaine in his belt, and Jose and Israel were supposed to "stay back in case of any rip-off, protecting the deal." (A-70). Israel and Jose, however, left the apartment first, (A71). When Pineda and Luis got outside, Pineda saw Jose and Israel right in front of the building (A-72), alghough Agent Jones

testified that Jose and Israel walked directly to the corner (T. 301). Jose spoke to Luis, and then returned to the corner (A73, T302). Pineda and Luis entered Agent Melvin's car, at which time Luis was arrested. (T 349). Pineda told Agent Jones, whose car had moved along side Melvins' that the "other two people were involved" (A136, T305). Agent Jones ran back up the street, heard a crash and saw a vehicle containing Jose and Israel stopped in the intersection (T306-307). Agent Carr had seen Jose and Israel enter the vehicle and had been informed by radio transmission from Agent Feeney to arrest them. (T320-321) As they were entering the vehicle, Agent Carr told them to halt; they entered the vehicle and backed it into the intersection. The vehicle hit another vehicle and stopped (T320-321). Jose and Israel were placed under arrest. (T324-325). At DEA headquarters, Agent Blackburn searched Jose LaBoy and found a small quantity of marijuana and a small quantity of cocaine (T 334-335).

A chemist identified the substance possessed by Luis LaBoy and the substance found on Jose LaBoy as cocaine, saying they came from the same package (T352) although one was 29.6% pure and the other was 26.4 per cent pure. (T352).

David Rodriquez was called as a witness for the defense and testified that he had known defendant for six

years and had never heard him called Dave or David (T390). JUAN BATTLE was called as a character witness.

The defendant testified, denying guilt and stating he saw the informant on only one occasion, December 3, 1974, and that he was present at the apartment with Israel Rodriquez in the afternoon of that day (Tr 434) but that he did not participate in any cocaine transaction.

He further testified that he had arrived at the apartment in the afternoon, (Tr446), that he fell asleep in the livingroom (Tr447). Israel Rodriquez woke him up and asked him to drive him to school (Tr448). A person was in the apartment when he awoke, (Alberto Pineda) but he did not speak to him (Tr452). He and Israel went downstairs and got into the automobile. (Tr452). At that time, Israel Rodriquez told him that Luis was going to engage in a drug transaction (Tr445). Jose got out of the car and approached Luis to tell him to "stop doing this". (Tr456). He returned to the corner and "stood awhile" because he was curious as to what was going to happen (Tr 457). When he entered the car, he backed up rather than proceed forward so as to not get involved in what Luis was doing (Tr458). Misjudging the turn, he hit another car and was then arrested (Tr460).

ARGUMENT

I

THE CONDUCT OF THE TRIAL COURT DEPRIVED DEFENDANT OF A FAIR TRIAL.*

The manner in which the trial judge conducted the trial deprived the dfendant of his constitutional right to a fair trial. The Court, through its inadvertent participation in the prosecution, its failure to properly rule on evidentiary objections and its conversion of the summation of defense counsel into a debate, caused the trial to be patently unfair to defendant. The orderly procedure implicit in the term "due process" was totally absent from this proceeding, with the result that defendant is entitled to dismissal of the charge or to a new trial.

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*At the outset, we would like to concede that the trial Court did not at any time deliberately or intentionally side with the prosecution - nor do we overlook th trial Court's conscientious exercise of his discretion against the government on a point of admissibility of a firearem, extraneous to the case in chief. However, the trial Court's unwarranted impatience and preoccupation with time must have obscured from the jury the fact that the Court was not participating in the prosecution of the case.

A. THE TRIAL COURT'S PARTICIPATION IN THE QUESTIONING OF PROSECUTION WITNESS.

To convict the defendant of any of the charges alleged, the jury would have to credit the testimony of the informer, ALBERT PINEDA. A review of the evidence shows that the testimony of the other government witnesses was mere surplusage. ALBERTO PINEDA was the only one who witnessed or claimed to have witnessed any of the acts which could support the charges herein; his testimony was the essence of the prosecution. The Court's participation in the questioning of this witness and its rehabilitation of his testimony during cross examination exceeded permissible bounds of proper conduct and presented the jury with the impression that the trial judge was part of the prosecution team.

The trial judge asked one question of the witness for every two presented by the Assistant United States Attorney. As a bare statistic this information is not startling. Further analysis of the testimony reveals that the Court took over the questioning each time the witness testified as to the meetings between himself and defendant thereby presenting the case for the prosecution. (A20-A31,

A33-A43, A51-A53, A60-A65, A-70-A72).* The transcript is replete with suggestions by the trial Court as what information to elicit from the witness, e.g. "Why don't you ask him how he came to meet them?" (A19). The Court even went so far as to adopt the preposition "we" in suggesting to the Assistant United States Attorney the questions to be asked. ("The Court: We can ask who was there" (A20)).

Objections of defense counsel, most pertinent in a conspiracy trial, asking for a proper description of an alleged conversation were met with the Court's rationalization of the manner of questioning, and a further suggestion as to the manner in which to proceed.

MR. PELTZ: Your Honor could we have the proper form of questioning as to what was said and by whom?

THE COURT: I think he is going to do that. Aren't you going to do that?

MR. ADLERSTEIN: Yes, I am, Your Honor.

THE COURT: He was just opening up the door to show the nature of the general discussion and then he will be specific. Is that your inclination?

MR. ADLERSTEIN: That is correct.

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*References to the Appendix

THE COURT: We are not going to let it stand that way.
(Emphasis supplied) (A20-21).

The Court fulfilled its prophecy of not letting it stand that way by proceeding to take over the questioning of the witness (A23-A26).

The pervasive feeling that the Court was a member of the prosecution is heightened by indications that the trial judge knew what the testimony would be before the witness so indicated. For example, the witness testified that while he was waiting in a car, another car containing JOSE LaBOY "drove up". The Court then stated:

> While you were waiting in front on 24 Furman Street for LOUIS LaBOY to return, a car came up alongside of you?
> (A-55) (Emphasis supplied)

The witness had not previously stated the position or proximity of the automobile. He then, immediately adopted the suggestion of the Judge, and placed the car in close proximity to the car in which he was sitting. (A55). Another example of the Court's indication of previous knowledge of the testimony is seen in his correction of the witnesses' testimony. The witness stated that he had told the persons

present "I will bring AGENT MELVIN up." The Court responded:

> "You didn't use the word agent. You said you will bring your buyer up. Is that what you said?
>
> The Witness: Yes." (A-100)

The error in this type of conduct is not in what the Court did or did not know about the prosecution's case, but in the impact on the jury. As the Supreme Court stated: "under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference, and may prove controlling." Starr v. United States, 153 U.S. 614, 626. 12 S.Ct. 919, 923, 38 L.Ed. 341 (1894). The Court's elicitation of testimony created the impression of a two-man prosecution. Its suggestions to the Assistant United States Attorney, its corrections of testimony and questioning to fill in the gaps in the prosecution all contributed to the inescapable image in the eyes of the jury that the judge was a member of the prosecution. cf. United States v. Cuevas, 710 F.2d 848 (2d Cir. 1975). The trial judge overstepped the boundaries of proper judicial conduct and "entered the lists". United States v. Fernandez, 480 F.2d

726, 737 (2d Cir. 1973); United States v. Marzano, 149 F.2d 923, 926 (2d Cir. 1945).

During the cross-examination of ALBERTO PINEDA, the major thrust of the defense was to show the failure of the witness to mention defendant in his reports to the agents. An attempt to show that the witness' trial testimony was not in accordance with his previous description of the events was met by the Court's removing this question from the jury's consideration by reiterating the testimony in such manner as to explain away the apparent discrepancy, lending credence to the testimony at trial rather than the reports. The witness had just been asked whether there was any omission in the report or whether it was a complete story. He replied that the report was complete. The following occurred:

> Q. Are you telling us if what you testified to agrees with the report, that what you have testified to today was not correct and that the report is correct.
>
> THE COURT: No, he's testifying the other way, what he says today is correct and he says that report is an abbreivated report, and while he only says Luis, the actual fact is that it includes David and Jose, as far as the discussion is concerned about the one-eight of a kilo. (A127).

A Federal Court judge has no right to answer a question put to a witness and further has no right to rehabilitate a government witness during the cross-examination by defense counsel. Such conduct is highly prejudicial to a defendant in any instance, but where, as here, it perverts an essential part of the defense, such conduct is reversible error.

B. THE TRIAL COURT'S FAILURE TO PROPERLY RULE ON EVIDENTIARY OBJECTIONS DEPRIVED DEFENDANT OF A FAIR TRIAL

There are two glaring evidentiary errors which added to the patent unfairness of this trial.

The first is inextricably related to the defense theory that the testimony connecting defendant to the transactions was a recent fabrication. As pointed out above, this was brought out by defense counsel during cross-examination of the primary government witness. The government, in an attempt to rebut this testimony, elicited over objection, through a government agent, that the informer had, in fact, mentioned defendant in his oral reports, although this was not included in the written versions.

The government relied on the new Federal Rule of Evidence 801(d)(1)(b), (T232-236) which states, in pertinent part:

> "A statement is not hearsay if - ...the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is...(B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication..." 28 U.S.C. Fed. Rules Evid. 801

It is clear from a mere reading of this Rule that it was misapplied below.

Leaving aside for the moment the impropriety of having the case agent, who was present during the entire trial, testify as to an alleged prior consistent statement of a previous witness, this Rule would only allow the government to have questioned PINEDA himself as to his prior statements or to introduce it through him. The declarant, PINEDA, must be available for cross-examination as to <u>his</u> prior statement. He was not available for such cross-examination and the Court refused defense counsel's request to recall him (T.375). The introduction of these statements through another witness was hearsay of the rankest sort. It is specifically noted in Advisor's Committee Notes that the rule is predicated on the declarant being "now available

for cross-examination concerning" the statement. (Note to Subdivision (d)(1), 28 U.S.C. Fed. Rules Evid. 801).

The severity of the error must be measured by the importance ~~of~~ to the defense of the theory of recent fabrication, and by the evidence to support such theory. The reports barely mentioned defendant.* (A178-180). Yet the informer tried to include defendant in statements and actions previously attributed to an alleged co-conspirator. This interpretation of Rule 801 was nothing less than plain error considering the situation at bar.

More pervasive "evidentiary" errors were committed by the Court's refusal to insist on non-leading questions by the Assistant United States Attorney. The extent to which the Assistant United States Attorney (and the Court) led the informer was egregious. Rule 611 of the Federal Rules of Evidence states that "leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony." 28 U.S.C. Federal Rules Evidence Rule 611.

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* Counsel was thwarted from calling this to the jury's attention by the Court's invasion of summation as more fully complained of at Point F, C, infra.

This discretionary power of a trial judge to allow leading questions is abused where the question asked has the effect of supplying a witness with a false memory. U.S. v. Johnson, 495 F.2d 1097, 1101(5th Cir. 1974); U.S. v. Durham, 319 F.2d 590, 593 (4th Cir. 1963). One reading the transcript herein is left with the distinct impression that absent the adoption of the answers suggested by the Assistant United States Attorney, the chief prosecution witness had no memory. For example, in attempting to set out the manner in which the informant began his alleged dealings with ALBERTO QUINONE, the following transpired.

Q. Mr. Pinada, did you talk to Alberto Quinone in connection with your work for Agent Melvin?

A. Yes, sir.

Q. And you talked to him about whether he could get drugs for you, is that not correct?

A. Yes, sir.

Q. And he said he might be able to, is that not correct?

A. Yes.

Q. Now shortly after meeting Alberto Quinone did you have occasion to meet anyone you see in the Courtroom today? (A17-18).

The leading did not stop when the testimony centered on one of the meetings. The Assistant United States Attorney asked:

> Q. When you got inside the apartment did you ask any of the people there about anything in particular?
>
> A. Yes, sir (A60).

Further examples of this type of leading are found throughout the direct testimony of the primary witness. (A40, A41, A43, A47 -49, A51). The net result was that the defendant was convicted on the testimony of the prosecutor rather than on the testimony of any witness. Lack of prevention of this departure from orderly trial conduct deprived defendant of his right to a fair trial.

C. THE TRIAL COURT TURNED DEFENSE COUNEL'S SUMMATION INTO A DEBATING MATCH, FURTHER DEPRIVING DEFENDANT OF A FAIR TRIAL

Defendant was completely denied his right to sum up for the jury by the Court's constant unnecessary interruption of the argument of defense counsel. The Court found it incumbent upon itself, without prior objection, to unnecessarily correct minor nomenclature (A148), object to casual reference to other criminal trials, dispute valid points

of argument (A150) and actually enter into a debate with defense counsel, for six pages of transcript, about certain of the arguments presented before the jury. (A153-A159).

Without having a time limit set on the summation prior to its commencement, defense counsel was repeatedly harrassed for taking too much time.* (A167, A172, A174, A176, A177). The Court refused to allow defense counsel to finish - granting him, as if this were a high school debating match, rather than a criminal trial - one last sentence. (A177). It was totally unnecessary, totally unfair, for the trial court to question defense counsel's recollection of the testimony (A168, A172) to quibble with him regarding choice of words (A176) or to state that he didn't know what defense counsel was talking about (A170). The judge even went so far as to ask the completely irrelevant question of how many defense witnesses there had been (A160).

*At a sidebar held during the summation, the judge first indicated that he was desirous of setting a time limit. (A149).

All of these interuptions prevented defense counsel from presenting any cohesive argument to the jury. This was a blatant abuse of discretion and improper. As contrasted to four interruptions of a summation in a recent 2d Circuit case, United States v. Miles, 481 F.2d 960 (2d Cir. 1973) there was a total of approximately forty instances in a one-hour summation of interruption. The basic types of interruptions were set out above. In addition to those, the Court questioned the relevancy of the principal government witnesses' credibility (A156).

Even if defense counsel did, at times, become rhetorical, or suggest application of a life experience to the facts of the case (which does not seem objectionable) the Court was unjustified in its treatment of defense counsel during summation. A U.S. District Judge should not reduce himself to harrassment or bickering with defense counsel during summation. Attempts by defense counsel to clarify the nature of the Court's objections and to minimize the quibbling via a side-bar conference were refused by the Court (A158).

The conduct of the Court during summation was improper and highly prejudicial. The Court's testing of defense counsel's memory ,logic and patience and his expression of impatience and exasperation could only result in the jury's being further influenced against appellant. Valid arguments were denigrated or obscured, and defendant was, as a result, denied his right to sum up to the jury.

II.

THE COURT'S CHARGE ON THE CRIME OF CONSPIRACY FAILED TO PROPERLY DEFINE THE CRIME.

The crime of conspiracy requires, as do most crimes, scienter. As was said by the Supreme Court, "Conspiracy to commit a particular substantive offense cannot exist without at least the degree of criminal intent necessary for the substantive offense itself." Ingram v. United States, 360 U.S. 672, 678, 79 S.Ct. 1314, 1319, 3 L.Ed. 2d 1053 (1959). The Court here neglected to charge any scienter with respect to conspiracy. The charge was therefore, fatally defective and defendant is entitled to a new trial.

The Court's basic definition of the crime of conspiracy was:

> The essence of the crime is the unlawful agreement among the parties to commit an offense against the United States -- in this case a violation of Section 841(a)(1) of Title 21 of the United States Code, that is, to knowingly and intentionally distribute quantities of cocaine. The actual accomplishment of the unlawful object of the conspiracy is not essential to the crime. Just a conspiracy or an agreement to commit the crime itself is sufficient to constitute a violation of the United States Code.
>
> The essential element of the crime of conspiracy to violate Section 841(a)(1) of Title 21 of the United States Code, otherwise stated, is the unlawful combination of two or more persons, pursuant to an unlawful agreement or common understanding, to commit the offense of knowingly and intentionally distributing quantities of cocaine, or knowingly or intentionally possessing cocaine for that purpose. There is no crime in the absence of such an agreement. (A194).

The guidelines presented for the jury to determine the defendant's participation in the conspiracy properly set out the rules as to consideration of the defendant's own actions and words, but failed to inform the jury that such participation must be found to the wiful. (A196-A197).

A comparsion of this charge on conspiracy to the charge approved by this Court on the case of U.S. v. Massiah highlights the errors herein. There the jury was told that

it had to find:

> "that each defendant knowingly and wilfully participated in the unlawful plan with the intent to advance and further some object or purpose of the conspiracy and had the specific intent to do some act which the law forbids."
> U.S. v. Massiah 307 F.2d 68 (2d Cir. 1962), rev'd other grds, 377 U.S. 201, 85 S.Ct. 1199, 12 L.Ed.2d 246 (1963).

The Massiah charge delineated three separate requirements of scienter. The defendant must be found to have participated knowingly and wilfully, to have intended to advance and further some object, and must have had the specific intent to commit a crime. Omission of any one of the three requirements of intent would be fatal. No where in the charge was the jury informed that the conviction of conspiracy required any intent. This jury was told "Just a conspiracy or an agreement to commit the crime itself is sufficient to constitute a violation." (A194), so long as "he was a member" thereof, that he knew the objects of the conspiracy and that he adopted the venture as his own. (A195-196) The requirement that he knowingly and wilfully became a member was omitted, as was the element that he have the specific intent to commit the crime. "Knowing the object of the conspiracy" and "adopting the venture" are not sufficient statements of the requirement

of intent to advance or further the conspiracy. Adoption of a venture is closer to acquiesence therein than it is to intent to further it. cf. United States v. Purin, 486 F. 2d 1363 (2d Cir. 1973), cert. denied, sub nom DaSilva v. United States, 416 U.S. 987 (1973).

A wilful participation of a conspiracy requires more than a mere passive adoption thereof. Adoption is acceptance whereas wilful participation is furtherance.

As to specific intent to commit the crime, the Court did recite the elements of the crime as the object of the conspiracy. He did not relate the intent to commit the substantive crime to the charge of conspiracy. Further, if one can be guilty of conspiracy to commit a crime "even though the crime was never committed" (A198) the Cout has really said that the intent to commit the crime is unnecessary to a finding of guilt as to conspiracy to commit the crime.

This discussion does not ignore the fact that the Court stated, late in the charge: "As I told you, the crimes charged in the indictment require knowledge of (sic) an intent to commit the crimes charged." (A 201) As to the

substantive count, the jury had been told that conviction requires that he possessed a controlled substance "intentionally, willfully and knowingly." (A192) This requirement was never connected to the crime of conspiracy by the Court and therefore the jury was never informed that this finding would be necessary to find guilt on conspiracy. It cannot be assumed that the jury picked up on the plural use of the word "crime" and was thus properly instructed as to this element. Not only was there no basis in the instructions on conspiracy which would indicate to the jury that the definitions of knowingly and intentionally were to be applied to that crime, the jury was told that "The essential element" of the crime, was the unlawful combination...pursuant to an unlawful agreement...to commit the offense..." (A194) Although the indictment itself contained the required scienter, the instructions to the jury omitted this element in toto. A reading of the indictment to the jury is not an explanation of the law. The charge on conspiracy as given allowed the jury to convict on a finding of the existence of an agreement and defendant's participation therein without any consideration of mens rea.

> "If justice is to be done in accordance with the rule of law, it is of paramount importance that the court's instructions be clear accurate, complete and comprehensible, particularly with respect to the essential

elements of the alleged crime.
U.S. v Clark, 475 F.2d 240 (2 Cir 1973)

Having been charged as to half a crime, the jury convicted defendant of half a crime. Defendant is therefore entitled to a new trial.

III.

THERE WAS INSUFFICIENT EVIDENCE OF DEFENDANT'S PARTICIPATION IN THE CONSPIRACY TO SUSTAIN A CONVICTION

The only witness for the government to any of these transactions was unable to testify as to who did or said what at any alleged meeting at which defendant was present. Despite constant objection by defense counsel, almost every act or statement was attributed to "they". This lack of delineation, objectionable in any criminal trial, is fatal to the charge of conspiracy herein.

Before statements of other conspirators may be used in evidence against this defendant, it must be proved by a fair preponderance of the evidence, independent of the hearsay, that the defendant participated in the conspiracy. United States v. Fantuzzi, 463 F.2d 683, 689 (2 Cir. 1972). One must therefore exclude from consideration, for the moment, all acts and statements which were not specifically attributed to the defendant.

One finds that there were no statements made at the first meeting which were attributed exclusively to defendant (A20-A27) and therefore this must be excluded for the purpose of determining defendant's participation. Similarly, there was no action or statement attributed to defendant during the meeting of November 21, (A35-A45). Defendant was not mentioned in connection with any events on November 27, 1974 (A51-A53). On December 3, 1974, he was seen entering 24 Furman Street (A56). Later that day, he took a box out of a closet (A61) and sniffed some cocaine (A64) and returned the box to the closet. Still later that same day, he again was present, but there are no statements or actions attributed exclusively to him; (A130-133). In sum, the government has shown, exclusive of presence at places where drug transactions were being discussed, that defendant snorted cocaine on December 3, 1974. As a matter of law, there was insufficient non-hearsay evidence to prove that appellant ever participated in any conspiracy.

IV.

THERE WAS FATAL VARIANCE BETWEEN THE CRIME CHARGED IN THE INDICTMENT AND THE PROOF AT TRIAL

This Court has recently restated the proposition

that a defendant, no matter how guilty he may be of some crime, cannot be convicted unless there is proof beyond a reasonable doubt that he committed the crime charged. U.S. v. Tavoularis 515 F. 2d 1070 (2 Cir. 1975). Notwithstanding this rule of law, this Circuit has consistently held that a variance between indictment and proof on a conspiracy charge wherein one conspiracy is charged, and more than one is proven, is not fatal absent prejudice, U.S. v. Miley, 513 F. 2d 1191 (2d Cir. 1975).

There was variance here, but of a different sort from that usually alleged. Defendant here was charged with conspiring with Luis LaBoy and Alberto Quinone. There was no allegation of unnamed, unknown or unindicted coconspirators, (other than Alberto Quinone). Perusal of the Grand Jury minutes shows that the three named as co-conspirators were the only ones mentioned in the whole proceeding (A222-A231). Yet if a conspiracy was proven, and if Jose LaBoy were found to be a member thereof, this conspiracy would, based on the proof, be a four person conspiracy. The words and actions attributed to Willie Cruz tend to show that his involvement was greater than that, if any, of the defendant herein, and yet there was no charge as to a William Cruz in the indictment. Inclusion of another person, unmentioned or alluded to in the

indictment in the proof is fatal variance.

The purpose of an indictment is to provide the defendant with notice of the charges he is to answer.

It would seem obvious that such notice must include, in a conspiracy charge, notice of the persons alleged to be co-conspirators. If such persons names are not known, the Grand Jury has the option of including the phrase "unknown conspirators" so as to put the defendant on notice as to the scope of the conspiracy. Warned by such notice, a defendant can seek a bill of particulars to ascertain the names or descriptions of persons alleged to be involved in the conspiracy. Here, however, the defendant was in no way prepared to defend against evidence of acts of a William Cruz.

This type of variance between indictment and proof may be inconsequential in huge, widespread conspiracies when a peripherally involved defendant probably would not know certain conspirators, by name or otherwise. This conspiracy was a tight-knit, three person agreement.

Accepting, as one must, the rule that acts of persons shown to be co-conspirators will be used as evidence against one shown to be a member of a conspiracy, the prejudice of the type of variance presented here becomes apparent. Prepared to

defend against not only his own acts, but acts of Luis LaBoy and Alberto Quinone, the defendant was forced to face evidence of acts and statements of a third person. This type of variance speaks to the essence of the "crime charged".

The argument here presented is very similar to that presented in United States v. DeCavalcante, 440 F.2d 1264 (3 Cir. 1971) with one important difference. In that case, the Court was troubled by the variance inherent in naming of a bill of particulars and introducing proof as to two persons not named in the indictment. These two people had testified before the Grand Jury, but were included in the bill of particulars under the leeway allowed by the inclusion of the "unknown" catch-all. The Court held that the inclusion in the bill of particulars was sufficient notice of the identities of the persons to defeat a claim of variance.

Here, as previously pointed out, there was absolutely no way defendant could have been placed on notice of the necessity of defending against allegations of being a member of a conspiracy which included William Cruz. The crime charged in the Indictment was not the crime for which defendant was tried and convicted. Failure of the indictment to provide proper notice of the nature of the proof to be adduced at trial is fatal

variance between the indictment and proof.

This point may be viewed from another angle. The only witness to testify before the Grand Jury was Agent Melvin (A222-231). He had no personal knowledge of the involvement of Jose LaBoy, if any; the testimony referring to him was complete hearsay. An indictment founded on hearsay evidence is not dismissed in this Circuit "unless that dismissal is required to protect the integrity of the judicial process." United States v. Leibowitz, 420 F.2d 39, 42 (2 Cir. 1969). Yet it becomes clear that the problems presented in this and the succeeding point would have been avoided by presentation of evidence by the informant before the Grand Jury. The Grand Jury would, presumably, have been fully advised as to the scope of this alleged conspiracy, and this variance problem would not have arisen. The integrity of the judicial process is being perverted when presentation of hearsay before the Grand Jury results in a prosecution based on a substantially different theory than that forming the basis of the Indictment.

V.

DEFENDANT WAS DEPRIVED OF HIS
RIGHT TO CALL WITNESSES
ON HIS BEHALF BY THE ACTION
OF THE U.S. ATTORNEY'S OFFICE.

Defendant was arrested on December 3, 1974 in the company of Israel Rodriquez, also arrested at that time. Israel Rodriquez was not indicted under this Indictment; the Indictment named Jose LaBoy, Luis LaBoy and Alberto Quinone (unindicted conspirator). Trial was to commence on May 19, 1975. In preparation for trial, defendant Jose LaBoy subpoened Israel Rodriquez to testify on his behalf. On the day before trial was to commence an Assistant United States Attorney telephoned Israel Rodriquez and asked him to come down to meet him. Mr. Rodriquez declined that invitation, and mentioned that he was under subpoena for the defense for the following day. On Monday, the Assistant requested a postponement of trial for the purpose of indicting Israel Rodriquez(H3)* In Court, the Assistant stated that he had decided on Saturday to indict Israel Rodriquez, and that the fact that Israel Rodriquez was prepared to testify for the defendant was not the reason for such decision (H,11). That decision was said

*refers to hearing minutes, May 19, 1975.

to be based on conversations with the informant in preparation for trial. (H,9-10) The adjournment was granted, over defendant Jose LaBoy's objection. (H,7) The trial Court responded to defense counsel's argument that such delay would result in the deprivation of a vital defense witness by stating that he could still testify. (H,11). A new indictment was handed up, but the defendant Rodriquez was not arraigned within the prescribed six month time period, and so that indictment had been dismissed. The propriety of such dismissal was before this Court, under the name of United States v. Rodriquez, Docket No. 75-13 ; the indictment was re-instated.

Trial was re-scheduled for September. Defense counsel made a speedy trial motion(A232-233), which was denied by the trial court on September 17, 1975, (A234-235) on the ground that the defense could subpoena Israel Rodriquez, and trial commenced. Defendant attempted to call Israel Rodriquez to the stand; however, he refused to answer questions put to him, on advise of counsel and after warnings from the trial court as to self-incrimination and the possibility of perjury indictment (T423-430). Defendant was thereby deprived of his right to call a vital witness to the stand.

That this witness' testimony would have been crucial

not only to the defense, but to the quest for truth in this case is evident. Israel Rodriquez was said by the informant to have been present and in the company of Jose LaBoy on every occasion in which Jose LaBoy was mentioned in this case. His version of what transpired on those occasions would have presented to the jury an eye-witness account of all relevant occurrences.

Appellant does not question the propriety of Israel Rodriquez' decision, under the circumstances, nor the propriety of the Court's reluctance to allow him to testify. The situation, however, was created by the U.S. Attorney's office. Despite the Assistant U.S. Attorney's protestations of innocent motive, the sequence of events shows that this situation was orchestrated entirely to prevent Israel Rodriquez from testifying for appellant. In United States v. Domenech, 476 F. 2d 1229 (2 Cir. 1973) cert denied; 414 U.S. 840 (1973), this Court stated that where a witness properly asserts his Constitutional right not to incriminate himself, there could and should be no penalty imposed on the Government just because that exercise redounded to the benefit of the prosecutor. The Court imposed an important condition to this ruling which was that it would apply "in the absence of any proof of deliberate manipulation or pre-arrangement by the United States Attorney"

United States v. Domenech, supra at 1331.

The sequence of events here clearly indicates that the Assistant's decision to indict Israel Rodriquez was a ploy to prevent him from testifying. The same file and informant were available to the Prosecution for five and one half months. The assistant claimed to have decided two days before trial, on a Saturday, to indict Israel Rodriquez. Yet the next day he telephoned Israel Rodriquez and asked him to come in to speak with him. What would be the purpose of this conversation, if the decision to indict had already been made? The Assistant would have us believe that his decision that Israel Rodriquez need not come to his office that Sunday was based on Israel Rodriquez telling him he had an attorney. That is ridiculous; it flies in the face of reality.

The Assistant knew Israel Rodriquez had been arrested prior to the time he telephoned him. Did he imagine he had been arraigned without an attorney? The only conclusion that can be reached is that the Assistant, hoping to have Israel Rodriquez testify as a witness for the prosecution and learning that he was intending to testify for the defense, deliberately acted to deprive the defendant of this witness by indicting him. The action of the Assistant U.S. Attorney was more sophisticated,

but comparable to his having bought Israel Rodriquez a ticket to Tahiti and telling him to stay out of the country until the end of the trial. Frustrated by the realization that Israel Rodriquez, an eyewitness, would probably cause him to lose the case, the Assistant effectively took Israel out of the action. The defendant is entitled to a new trial, provided this Court has not already mandated dismissal.

CONCLUSION

Defendant is entitled to a dismissal of the charge for the failure of evidence to show his participation in the conspiracy, and for the variance between indictment and proof. In the alternative, he is entitled to a new trial because the charge to the jury omitted an essential element of the crime and because the conduct of the trial court deprived him of a fair trial. He is also entitled to a new trial because the conduct of the United States Attorney's Office deprived him of the right to call a witness on his own behalf.

Respectfully submitted,

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